Public Prosecutor v Chan Wai Heng

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-09–80 OF 2006
MOHD GHAZALI, HELILIAH AND RAUS SHARIF JJCA
20 JUNE 2008

Criminal Procedure — Appeal — Conviction and sentence, against — Accused charged under s 377C of the Penal Code — Whether trial judge misdirected himself on medical evidence before him — Whether trial judge had ascertained whether complainant, a child witness had understood duty of speaking the truth — Whether High Court ought to have interfered with finding of fact by sessions court

Criminal Procedure — Trial — Duty of court — Failure by trial judge to record that prima facie case had been made out against accused at conclusion of case for prosecution — Whether failure to observe provision s 173(f)(i) of Criminal Procedure Code amounted to misdirection in law — Criminal Procedure Code s 173(f)(i)

Evidence — Witness — Child witness — Evidence of child witness who did not understand meaning of oath or affirmation — Whether trial judge had applied proper procedure in ascertaining level of understanding of complainant child — Whether medical evidence tendered inconsistent and not corroborative of complainant's evidence

The accused/respondent had been charged and convicted by the sessions court under s 377C of the Penal Code. The complainant against whom the acts were alleged to have been perpetrated was a seven year old boy. The accused dissatisfied with the conviction and sentence had appealed to the High Court by contending that the trial judge in failing to record, expressly or more specifically, in the notes of evidence that he had found that a prima facie case had been made out against the accused at the conclusion of the case for the prosecution, had caused a miscarriage of justice which occasioned intervention. In addition the accused had mounted a challenge on firstly the procedure applied by the sessions court judge in ascertaining the level of understanding of the complainant, a child witness, and secondly the nature of corroboration with regard to the child's testimony. The High Court allowed the appeal on the grounds that the sessions court had failed to

observe the provision of s 173(f)(i) of the Criminal Procedure Code ('CPC'); that s 133A of the Evidence Act 1950 ('the Act') had not been adhered to in that the evidence of the complainant, a child, had not been supported with corroborative evidence because the medical evidence which was supposed to corroborate the child's evidence was inconsistent and inconclusive. This appeal by the prosecution was against the decision of the High Court in allowing the accused's appeal.

Held, allowing the appeal and restoring conviction and sentence determined by the sessions court judge:

(1) The failure of recording expressly in the notes of evidence that a prima facie case had been made out did not reflect that there was a failure on the part of the sessions court judge to evaluate the case for the prosecution before directing the respondent in this appeal to enter his defence. In effect, the High Court judge overlooked a paragraph in the grounds of judgment of the sessions court judge which indicated that an evaluation of the case for the prosecution had been made out. Having considered the overlooked paragraph wherein it is stated that, 'the prosecution had proven a prima facie case on the charge preferred against the accused', it is found that there was merit in the appellant's submission. In any case, there is no mandatory rule that the sessions court judge must record in the notes of evidence that a prima facie case had been made out at the conclusion of the case for the prosecution before calling upon an accused to enter his defence (see paras 11–12).

(2) There is no set or fixed procedure to be observed in ascertaining the level of understanding of the child. However, it was clear from a scrutiny of the notes of evidence recorded by the sessions court judge that he had satisfied himself that the child witness did not comprehend the oath and thereafter embarked on a process of ascertaining the child's level of understanding. There did not appear to be any merit in the contention of the accused that in the process of ascertaining the competency of the child it is obligatory that the questions must have been posed by the sessions court judge himself as a prerequisite to the admissibility of the evidence, ie that there should be conducted a voir dire. This would not reflect the correct approach. The grounds of judgment and the notes of evidence of the sessions court judge have sufficiently disclosed that he had directed his mind to the requirements of s 133A of the Act before embarking on the process of permitting the prosecution to lead evidence on the acts that were committed on the complainant by the accused (see para 35).

(3) An appraisal of the records showed that the sessions court judge had made a finding of fact on the issue of corroboration of the

complainant's evidence by considering all the medical evidence in toto. Instead of considering the medical reports as three inconsistent pieces of medical evidence the medical evidence was used to lend support in its own way to the fact of the injuries caused to the complainant and thereby to show that it was consistent with the version of the evidence given by the complainant (see para 41).

(4) It is established law that an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and hence of assessing their credibility. Given the facts in this case it was found that there was no misdirection by the sessions court judge such as to render the trial conducted by him a nullity (see para 49).

[Bahasa Malaysia summary

Tertuduh/responden dituduh dan disabitkan oleh mahkamah sesyen di bawah s 377C Kanun Keseksaan. Pengadu yang telah melakukan tindakan-tindakan yang dikatakan tersebut merupakan budak lelaki berumur tujuh tahun. Tertuduh tidak berpuas hati terhadap sabitan dan hukuman merayu ke Mahkamah Tinggi, menyatakan bahawa apabila hakim bicara gagal merekodkan, secara jelas atau lebih terperinci, dalam nota keterangan, bahawa dia telah mendapati satu kes prima facie terhadap tertuduh pada akhir kes pendakwaan, telah mengakibatkan salah laksana keadilan yang mana boleh menyebabkan campur tangan Mahkamah Tinggi. Tertuduh juga mempertikaikan; pertama, prosedur yang diguna pakai oleh hakim mahkamah sesyen dalam menilai pemahaman pengadu, iaitu seorang saksi kanak-kanak; kedua, sifat sokongan berkaitan keterangan kanak-kanak tersebut. Mahkamah Tinggi membenarkan rayuan atas alasan-alasan bahawa mahkamah sesyen gagal mematuhi peruntukan s 173(f)(i) Kanun Prosedur Jenayah ('KPJ'); bahawa s 133A Akta Keterangan 1950 tidak dipatuhi, di mana, keterangan pengadu, seorang kanak-kanak, tidak disokong oleh keterangan sokongan kerana keterangan perubatan yang sepatutnya menyokong keterangan kanak-kanak tersebut tidak konsisten dan tidak membawa kepada apa-apa keputusan. Rayuan oleh pihak pendakwaan ini adalah terhadap keputusan Mahkamah Tinggi yang membenarkan rayuan tertuduh.

Diputuskan, membenarkan rayuan dan mengenakan semula sabitan dan hukuman yang ditentukan oleh hakim mahkamah sesyen:

(1) Kegagalan merekodkan dengan jelas dalam nota keterangan bahawa hakim telah mendapati satu kes prima facie tidak menunjukkan bahawa hakim mahkamah sesyen gagal menilai kes pendakwaan sebelum

A mengarahkan responden dalam rayuan ini membela diri. Malah, hakim Mahkamah Tinggi tidak nampak satu perenggan yang berbunyi, 'pihak pendakwaan berjaya membuktikan satu kes prima facie atas pertuduhan yang dibuat terhadap tertuduh', didapati bahawa penghujahan perayu bermerit. Tidak ada peraturan mandatori yang menyatakan bahawa
B hakim mahkamah sesyen mesti merekodkan dalam nota keterangannya bahawa dia telah mendapati satu kes prima facie pada akhir kes pihak pendakwaan sebelum memanggil tertuduh membela dirinya (lihat perenggan 11–12).

C (2) Tidak ada satu prosedur yang tertentu atau tetap yang perlu dipatuhi untuk menentukan tahap pemahaman kanak-kanak itu. Walau bagaimanapun, jelas daripada pemeriksaan teliti ke atas nota keterangan yang direkodkan oleh hakim mahkamah sesyen bahawa dia berpuas hati bahawa saksi kanak-kanak itu tidak faham sumpahnya, kemudian
D memulakan proses untuk memastikan tahap pemahaman kanak-kanak itu. Tidak ada merit dalam hujahan tertuduh apabila mengatakan bahawa dalam proses memastikan pengetahuan kanak-kanak tersebut mewajibkan soalan-soalan dikemukakan oleh hakim mahkamah sesyen itu sendiri, sebagai syarat kebolehterimaan keterangan, iaitu proses
E tersebut seharusnya dilaksanakan secara voir dire. Ini tentunya tidak menggambarkan pendekatan yang betul. Alasan-alasan penghakiman dan nota keterangan hakim mahkamah sesyen cukup memperlihatkan ia mengarahkan mindanya kepada keperluan s 133A KPJ sebelum memulakan proses membenarkan pihak pendakwaan mengemukakan
F keterangan atas tindakan-tindakan yang telah dilakukan ke atas pengadu oleh tertuduh (lihat perenggan 35).

(3) Penilaian atas rekod-rekod menunjukkan bahawa hakim mahkamah sesyen membuat satu penemuan fakta dalam isu keterangan sokongan
G pengadu dengan mempertimbangkan semua keterangan/bukti perubatan secara tuntas. Di sebalik mempertimbangkan laporan-laporan perubatan sebagai tiga keterangan berasingan yang tidak konsisten, keterangan perubatan tersebut digunakan untuk
H menyokong dengan cara yang tersendiri kepada fakta kecederaan terhadap pengadu dan oleh itu menunjukkan bahawa ia adalah konsisten dengan keterangan yang diberikan oleh pengadu (lihat perenggan 41).

(4) Adalah undang-undang tetap bahawa mahkamah rayuan seharusnya
I tidak cepat campur tangan terhadap penemuan fakta oleh mahkamah rendah kerana mahkamah rayuan tidak berpeluang melihat dan mendengar saksi-saksi untuk menilai kredibiliti mereka. Melihat kepada fakta-fakta kes, tidak ada salah arah oleh hakim mahkamah sesyen yang membolehkan perbicaraan tersebut batal (lihat perenggan 49).]

Notes

For cases on child witness, see 7(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2639–2649.

For cases on conviction and sentence, against, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 262–295.

For cases on duty of court, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4753–4756.

Cases referred to

Arulprasagan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Chao Chong & Ors v PP [1960] MLJ 238 (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (refd)
JV Wagh v State of Maharashtra 1996 Cri LJ 803 (refd)
Kabiraj Tudu v State of Assam 1994 Cri LJ 432 (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 39 (folld)
PP v Ishak Hj Shaari & Other Appeals [2003] 4 MLJ 585 (refd)
PP v Mohd Radzi Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79 (folld)
Sidek bin Ludan v PP [1995] 3 MLJ 178 (refd)
Yap Chai Chai & Anor [1973] 1 MLJ 219 (refd)
Yusaini Mat Adam v PP [1999] 3 MLJ 582 (distd)

Legislation referred to

Criminal Procedure Code ss 173(f)(i), 422
Evidence Act 1950 s 133A
Penal Code s 377C

Appeal from: Criminal Appeal No 42–9 of 2003 (High Court, Ipoh)

Jamhirah bt Ali (Deputy Public Prosecutor, Attorney-General's Chambers) for the appellant.
Naran Singh (Naran Singh & Co) for the respondent.

Heliliah JCA (delivering judgment of the court):

[1] The public prosecutor has appealed against the decision of the learned High Court judge in allowing an appeal lodged by the respondent in this appeal before us whereby the conviction and sentence made in respect of the respondent by the sessions court judge have been set aside.

[2] The respondent had been charged under s 377C of the Penal Code which provides:

> 377C Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less then five years and not more than twenty years, and shall also be liable to whipping.

[3] At the time the acts were alleged to have been perpetrated the complainant (or SP7) in this case was a male child seven years of age.

[4] The learned High Court judge in the judgment in allowing the appeal has held as follows:

(i) that there was a failure on the part of the sessions court judge to observe the provision of s 173(f)(i) of the Criminal Procedure Code;

(ii) since s 133A of the Evidence Act 1950 has not been adhered to, the evidence of the child has not been supported with corroborative evidence. The evidence given by certain witnesses who gave medical evidence were held to be inconclusive.

[5] The two aforementioned matters constitute the issues raised in this appeal.

First issue: s 173(f)(i)

[6] At the conclusion of the case for the prosecution held before the sessions court judge who had conducted the trial he had merely recorded the following in the notes of proceedings *Pembelaan dipanggil*. In the grounds of judgment written by him the following statements could, inter alia, be found:

> At the end of the prosecution's case, I have to decide whether the prosecution had proven a prima facie case.

[7] On this issue the learned High Court judge has upheld the averments of learned counsel for the respondent that the trial judge had failed to record expressly or more specifically in the notes of evidence a finding at the conclusion of the case for the prosecution that a prima facie case had been made out as against the accused (the respondent in this appeal). It was the contention of learned counsel that this had resulted in a misdirection in law which had prejudiced the respondent. In appraising this issue pertaining to the alleged non-observance of the provision of s 173(f)(i) of the Criminal Procedure Code ('CPC') it is rendered necessary to reproduce verbatim the observation of the learned High Court judge where he stated:

Tuan Hakim hanya menyatakan fakta prima facie dalam alasan penghakiman beliau di muka surat 55 Rekod Rayuan iaitu 'at the end of the prosecution's case, I have to decide whether the prosecution had proven a prima facie case'. Pada pendapat Mahkamah ini tidak memadai. Ia perlu dicatat dalam nota prosiding semasa prosiding berjalan dan bukan dalam alasan penghakiman yang dibuat kemudian. Beliau sepatutnya mencatatkan dalam nota prosiding pendakwaan berjaya membuktikan satu kes prima facie terhadap tertuduh.

[8] The above mentioned proposition of the learned judge appears to be a categorical interpretation of s 173f(i) of CPC that it is imperative for the sessions court judge to record in the notes of proceedings a finding that a prima facie case had indeed been made out at the close of the case for the prosecution. In other words what is being pronounced here is more akin to a technical default of not writing down in the notes of proceeding that a prima facie case had been established at the conclusion of the case for the prosecution.

[9] It would appear that the learned High Court judge had unreservedly accepted the submission of learned counsel for the respondent that the sessions court judge, in failing to record expressly in the notes of evidence that he had found that a prima facie had been made out against the respondent at the conclusion of the case for the prosecution, had therefore caused a miscarriage of justice which occasioned intervention for this was one of the grounds upon which the conviction was set aside.

[10] This finding runs contrary to the decision made in the then Supreme Court case in *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 and the decision of the Federal Court in *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393 where the observation of Ong CJ in *Yap Chai Chai & Anor* [1973] 1 MLJ 219 had received unreserved approbation. Since this issue pertains to the duty of a trial judge at the close of a prosecution's case and to obviate the regurgitation of issues discussed extensively in the decision of *Arulprasagan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 it is found pointedly necessary to echo the most relevant excerpts in the context of the duty of trial judge sitting alone be it a magistrate, sessions court or a High Court judge as found in the following passage (per Hj Mohd Azmi bin Dato' Hj Kamaruddin SCJ in *Junaidi bin Abdullah*, at p 222):

In *Yap Chai Chai & Anor v PP*, in an appeal to the then Federal Court against conviction on a murder charge, it was argued that it was mandatory for the trial judge, at the close of the prosecution's case, to enter on the record, his opinion that there was a case to answer and that his failure to do so rendered the trial a nullity. In dismissing the appeal, Ong CJ said at p 221:

> Leaving aside for the moment the second appellant's statement, we are clearly of opinion that the facts which were indisputable had established a clear prima facie case, and that the learned trial judge would have been wrong to withdraw the case at that stage from the jury. We do not think that the provisions of s 204(2) of the Criminal Procedure Code (SS Cap 21) had any application, nor do we agree with the contention of Datuk SP Seenivasagam that it was mandatory for the judge at the close of the prosecution to enter on the record his opinion that there was a case to answer — the failure to do so rendering the trial a nullity. As authority for this proposition two cases were cited to us, being the judgments delivered by Willan CJ in *Ng Peng Choon v Public Prosecutor* [1947] MLJ 87 and *Govindasamy v Public Prosecutor* [1949] MLJ 101. In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of paramount importance in the administration of criminal justice is a fair trial — not such excessive legalism as to give the ordinary meaning of words the sacrosancity of a ritual.

In our opinion, there is also no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for doing so, such as where a submission to answer has been made in a complex case, or where the accused is called to enter a defence on a lesser or alternative charge, judges do sometimes give their reasons. In uncomplicated cases, such as in the instant appeal, it is not obligatory or even necessary to do so. By calling an accused to enter his defence, it should be assumed that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis.

[11] The failure of recording expressly in the notes of evidence that a prima facie case had been made out did not reflect that there was a failure on the part of the sessions court judge to evaluate the case for the prosecution before directing the respondent in this appeal to enter his defence. In effect the learned High Court judge appeared to have overlooked a paragraph in the grounds of judgment of the sessions court judge which indicated that an evaluation of the case for the prosecution had been made and this is found in the following statement:

> Besides the material evidence that corroborated the evidence of SP7, I am also convinced that SP7 was telling the truth in court. Despite his age, SP7 gave a clear and detailed evidence without any contradiction. In the event, the prosecution had proven a prima facie on the charge preferred against the accused and I called for the accused to enter into his defence.

[12] Having considered the above we find that there is merit in upholding the submission of the learned deputy public prosecutor on this issue. There is no mandatory rule that the sessions court judge must record in the notes of evidence that a prima facie case has been made out at the conclusion of the case for the prosecution before calling upon an accused to enter his defence.

Second issue: The issue of non-compliance with s 133A of the Evidence Act 1950 (Act 1950)

[13] Section 133A Act of the 1950 provides:

> 133A. Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code [Act 593] shall be deemed to be a deposition within the meaning of that section;
>
> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof of implicating him.

[14] There are two aspects to be considered in relation to this issue of the appeal. The first aspect is a question of procedure and the second a substantive question.

[15] Section 133A refers to a situation where a child of tender years is called as a witness and does not understand the nature of an oath. In such a situation his evidence may still be received though not given upon oath if in the opinion of the court he possesses sufficient understanding to justify the reception of the evidence, and the child understands the duty of speaking the truth.

[16] The first part of s 133A therefore governs the admissibility of the evidence of the child though not given under oath. The proviso deals with the way in which the evidence once admitted is to be treated, that is, where the evidence admitted as such is given on behalf of the prosecution, the proviso requires that the evidence is to be corroborated by some other material evidence in support thereof in order to implicate the accused.

[17] In the appeal proceedings before the High Court judge (the respondent in the present appeal before us) had mounted a challenge on

firstly, the procedure applied by the sessions court judge to ascertain the level of understanding of SP7 and secondly, the nature of corroboration.

[18] SP7 was nine years old at the time he gave evidence. He was then seven years at the time certain acts were committed on his person which now became the gravamen of the charge against the respondent. In order to evaluate whether there was an infirmity in the process of SP7's evidence being admitted excerpts from the notes of proceedings of the sessions court judge are referred to as follows:

SP7:

Yeow Wai Leong 9 tahun

Oath read to by court interpreter and explained to SP7. SP7 mengata Oath means I cannot tell lies. SP7 tidak dapat mengatakan apa yang patut dicakapkan berkenaan oath.

Mahkamah:

SP7 does not understand the nature of the oath — under s 133A.

t.t.: Wong Teck Meng

TPR bertanya:

Q : Mengapa kamu datang ke Mahkamah.

SP7 : Untuk bercakap.

Q : Untuk bercakap apa?

SP7 : Ada orang buat saya.

Q : Kamu darjah berapa?

SP7 : Saya darjah tiga.

Q : Apa nama sekolah.

SP7 : Sekolah Poey Lam di Kampar.

Q : Macam mana pergi ke sekolah?

SP7 : Dengan bas sekolah.

Q : Siapa jaga awak?

SP7 : Selepas balik dari sekolah emak yang jaga.

Q : Ada main apa di sekolah?

SP7 : Saya ada main bola.

Q : Awak datang ke Mahkamah untuk bercakap benar?

SP7 : Saya mesti cakap benar.

Q : Apa itu cakap benar?

SP7 : Tidak boleh cakap bohong.

Q : Kalau jaket saya yang berwarna hitam dikatakan warna merah?

SP7 : Ini bercakap bohong.

Q : Kalau awak bohong apa jadi?

SP7 : Masuk penjara.

Mahkamah:

SP7 is possessed of sufficient intelligence and understands the duty of speaking the truth.

tt: Wong Teck Meng

[19] The notes of proceedings disclose that it was the court that came to the finding as follows:

Mahkamah:

SP7 does not understand the nature of the oath — under s 133A.

[20] The challenge that was made in respect of the way in which the evidence of SP7 was finally received in evidence in the appeal proceedings before the High Court judge was that:

(i) the sessions court judge was not the person who posed the questions to the child; and

(ii) the child was not cross-examined by defence counsel apparently in aid of ascertaining the level of the child's understanding.

[21] It is to be noted that nowhere is there proscribed a specific procedure to be observed in ascertaining the level of the child's understanding.

[22] In alleging that there is an infirmity in the procedure applied by the sessions court judge in receiving the evidence of SP7 the decision in *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178 has been cited. Learned counsel for the respondent appeared to rely on the judicial observation in this aforementioned case to lend support to an argument that the procedure applied by the sessions court judge suffered an infirmity and the passages relied upon is as follows (per Abdul Malik Ishak J at p 176):

> The proviso to s 133A of the Act in simple terms means this: A conviction cannot stand on the uncorroborated evidence of an unsworn child witness. It is insufficient for the trial court to merely administer a warning on the dangers of so convicting as the amendment now makes it a rule of law, more explicitly, that the evidence of an unsworn child witness shall be corroborated (*PP v Mohd Noor bin Abdullah* [1992] 1 CLJ 702). This amendment distinguishes between the testimony of a sworn and an unsworn child witness. In the case of a sworn child witness the old rule of prudence applies, viz, the need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence. Whereas in the case of an unsworn child witness, s 133A of the Act, applies.
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> ... From the wording of s 133A of the Act, *the trial court is obligated by way of a preliminary examination to ascertain the child's capacity to understand and give rational answers.*

[23] It is obvious that in that case the learned judge had the record of the proceedings in that case in mind to make a finding where he stated:

> ... Towards this end the trial court has fulfilled that obligation and from the appeal record before the victim gave evidence under oath, the following annotations were recorded...

[24] It could be observed that in the circumstances of that case the child witness gave testimonies under oath before the trial court. However learned counsel in emplacing such emphasis on the 'preliminary examination' on the issue of the level of understanding has defaulted in not referring to other observation in the same case found in p 177, the relevant parts of which are as follows:

> Next, it was argued by the defence that before accepting the evidence of the child witnesses the trial court should conduct a voire dire (trial within a trial) to determine competency. With respect, the question of the voluntariness of the evidence of the child witnesses is not an issue to be adjudicated upon by the trial court.... The competency of any person (child witness included) to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and, clearly, it is a question distinct from that of his credibility when he has been sworn or affirmed. In determining the question of competency, the court acting under s 118 of the Act, is entitled to test the capacity of a witness by putting proper questions. The court has to ascertain the intellectual capacity and understanding of the witness (child witness included) to give a rational account of what he has seen or heard or done on a particular occasion. It can therefore be appreciated that there is a world of difference between competency of a witness which can be ascertained without having to undergo a voire dire, as opposed to the voluntariness of the appellant's cautioned statement, which if challenged, should proceed by way of a voire dire. This objection fails.

[25] Yet another case cited to assert an infirmity in the procedure applied by the sessions court judge is *Yusaini Mat Adam v Public Prosecutor* [1999] 3 MLJ 582. However it has to be noted at the very outset that the facts of that case were distinguisable in that there was a total failure to take into account s 133A of the Evidence Act 1950. Learned counsel for the defence relied on the following:

> ... When a child of tender years is called to be a witness the procedure is for the court to hold an inquiry to form an opinion if the child is in the position to be sworn (see eg the Federal Court case of *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222 at 223). However, the sessions court judge did not hold such an inquiry before she allowed the child to give her evidence. Unfortunately in this case neither the learned judge of the sessions court nor the DPP nor the counsel who acted for the appellant in the court below appeared to have been aware of s 133A of the Evidence Act 1950 which reads: ...

[26] Further on it was also stated:

> As was observed by *Andrews & Hirst in Criminal Evidence*, (3rd Ed, 1997):
>
> > The competence of a child could never be presumed. Even for the purpose of giving unsworn testimony, it was still necessary to establish by positive means that the child understood the ordinary duty of telling the truth. It was the duty of a court or judge to determine competence and the proper level of competence before proceeding to admit evidence from a child. This could involve the child being asked questions by the trial judge, and it could also involve the calling of expert opinion evidence from child psychologists. If a child was allowed to testify without such prior examination, any conviction based on that child's evidence was liable to be quashed on the ground of material irregularity (*R v Khan* (1981) 73 Cr App R 190).
>
> If the Sessions Judge had, after an inquiry, decided that 'the child had a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking the oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct' the judge would have been on guard when assessing the evidence of the child.

[27] Moreover the evidence that were actually being considered in that case were sworn testimonies and that being so some of the observations there including references to the treatise by Andrews & Hirst remain obiter.

[28] In yet another decision Konst 115256 Ridzuan bin Ismail (Criminal Hpp No 42–10 of 1994 – unreported) Ahmad Hj Maarop J (now JCA) dealt with a similar issue on the reception of the evidence of a witness who was then 15 years and the application of s 133A. He stated:

A Adalah jelas bahawa peruntukan di bawah seksyen tersebut hanya terpakai bagi *seorang kanak-kanak yang berumur muda* yang dipanggil sebagai saksi, yang pada pandangan mahkamah, tidak memahami sifat suatu sumpah. Dalam keadaan demikian, keterangan kanak-kanak tersebut boleh diterima walaupun tidak diberi dengan bersumpah, *jika, dalam pandangan mahkamah, kanak-kanak itu*
B *mempunyai kecerdikan yang mencukupi untuk mewajarkan keterangannya diterima dan jika kanak-kanak tersebut memahami tanggungjawab untuk bercakap benar*. Proviso kepada s 133A itu juga menyatakan bahawa keterangan yang diterima masuk di bawah s 133A itu tidak boleh digunakan untuk mensabitkan orang kena tuduh, melainkan keterangan itu disokong oleh keterangan lain yang mengaitkannya. Pendeknya, keterangan yang menyokong (corroboration) adalah
C satu keperluan yang wajib untuk membuat sabitan [*Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178, *Public Prosecutor v Mohd Nordin bin Abdullah* [1992] 1 CLJ 702]. *Di dalam menilai s 133A, s 118 Akta Keterangan hendaklah juga diambil kira.* Seksyen 118 memperuntukkan bahawa semua orang adalah layak untuk memberi keterangan secara bersumpah melainkan mereka dihalang
D dari memahami soalan yang ditanya, atau dihalang dari memberikan jawapan yang rasional atas sebab umur muda mereka, umur mereka yang sangat tua, atau disebabkan oleh apa-apa penyakit. Tidak ada had umur tertentu yang ditetapkan untuk menentukan sama ada seorang kanak-kanak itu layak memberikan keterangan secara bersumpah, kerana kanak-kanak yang sama umur boleh
E mempunyai perkembangan mental dan kebolehan yang berbeza untuk memahami soalan-soalan serta memberi jawapan-jawapan rasional. Oleh itu mahkamah mempunyai budi bicara untuk membuat kesimpulan sama ada seseorang kanak-kanak itu mempunyai pemahaman dan kecerdikan yang mencukupi untuk melayakkannya menjadi saksi yang kompetan dan untuk tujuan ini adalah tidak wajib bagi mahkamah itu menjalankan siasatan awal [lihat *R v Nafar* 41 C 406; 18
F CWN 147; 1939 2 Cal 569; *Lakhan v R* 20 P 898; A 1942 P 183].

[29] Certain judicial statements from India also indicate that there is no fixed procedure by which the trial judge could ascertain whether a child understands the duty of speaking the truth although he does not understand
G oath or affirmation.

[30] In *JV Wagh v State of Maharashtra* 1996 Cri LJ 803 Vishnu Sahai J who had to address a similar issue stated:

H Mr Mundargi, learned counsel for the appellant, made two submissions before me.

He firstly urged that the prosecutrix was a young girl aged about eight years and the learned trial judge should have conducted her preliminary examination in order to ascertain in the level of understanding and only thereafter should have
I proceeded to record her statement. There can be no dispute that it would have been certainly better for the learned judge to have first conducted a preliminary examination of the prosecutrix by putting some questions to her and on the basis of answers given by her in reply to them satisfied himself whether she was possessed of sufficient understanding. However, the failure to hold a preliminary examination of a child witness does not indroduce a fatal infirmity in the evidence.

I am fortified in my view by a Division Bench decision of the Allahabad High Court reported in 1959 Cri LJ 796, Ram Hazoor Pandey, *Appellant v State*, respondent, wherein in para 11 Their Lordships have observed thus:

> Although it is not necessary to have a preliminary examination, namely, voire dire, of a child witness in order to make his testimony admissible, nevertheless, such a course is desirable and should be resorted to, for it offers an opportunity to the court to assess the mental capacity of a child witness.

The whole object of a preliminary examination is to ascertain the level of understanding of a witness. If the same can be assessed from the statement she gave in court, failure to record a preliminary examination would have no adverse bearing on the prosecution case. On a perusal of the statement of the prosecutrix, it is implicitly clear that she was possessed of sufficient understanding....

[31] Another decision also dealt not only with the question of a preliminary examination but also the question of corroboration which is pertinent to the second aspect of the issue pertaining to the requirements of the proviso to s 133A of the Act 1950.

[32] In *Kabiraj Tudu v State of Assam,* 1994 Cri LJ 432 (Gauhati High Court) UL Bhat CJ and DN Baruah J, the following statement is relevant:

> Section 118 of that Act is understood as taking in a child witness since reference is made to a person who by tender years is unable to understand the questions put to him or from giving rational answers to those questions. Section 118 of the Evidence Act and the proviso to s 4(1) of the Oaths Act deal with two different aspects. The former deals with competency to testify and the latter deals with competency to take an oath. Competency to testify depends on the witness's ability to understand questions put to him and to give rational answers to those questions. Competency under the Oaths Act depends on the witness's comprehension of the duty of speaking the truth and the nature of an oath or affirmation. Once a witness is found to be a competent witness, even if he is not competent to take an oath or if there is an omission to take an oath that will not invalidate the proceedings or render inadmissible the evidence. The rule generally is in favour of admission of evidence though the weight to be attached to it will naturally be a matter for consideration by the court. There is always competency unless the court considers otherwise. If a witness is not competent he will not be examined in court. In the case of a child, it depends on the capacity of the child, his appreciation of the difference between truth and falsehood as well as his duty to tell the former. The decision of this question rests with the trial judge, who sees the proposed witness, notices his manner, his apparent possession, or lack of intelligence. The trial judge may resort to any examination which will tend to disclose the capacity and intelligence and in the case of an oath, his understanding of the obligation of an oath. See *Rameswar Kalyan Singh v State of Rajasthan* AIR 1952 SC 54: (1952 Cri LJ 547); *George L Wheeler v United States* 159 US 523; *Krishna Kahar v Emperor* AIR 1940 Cal 182; *Ram Hazoor Pandey v State* AIR 1959 All 409; (1959 Cri LJ 796) *Basu v State of Kerala,* 1960 ILR Ker 256 and *Ponnumani v State of Kerala*

1987 (2) Ker LT 1042. Oath or affirmation shall be made by all witnesses, the only exception being the case of a child under 12 years of age *where the court is of the opinion that though he understands the duty of speaking the truth he does not understand oath or affirmation. If the court is so satisfied, oath will not be administered to the witness. The evidence will nevertheless be admissible*.

Whenever a witness appears before court, the court will proceed on the basis that he is competent to testify. *When a witness is a person of tender years or extreme old age or a person who suffers from disease or other abnormality of the body or mind, the court is alerted to test his competency. Similarly where a witness is a child the court is alerted on the need to decide whether oath can be administered. Ordinarily this satisfaction is to be arrived at by preliminary examination of the witness by the court. This does not mean that in the absence of preliminary examination the evidence becomes inadmissible since the general rule is in favour of the competency and satisfaction, if necessary, can be arrived in the course of the evidence.* However, trial courts would do well to conduct preliminary examination to satisfy themselves in regard to the competency under s 118 of the Evidence Act as well as under the proviso to s 4(1) of the Oaths Act. It is highly desirable to bring on record the questions and answers put to the witness and to make a record of the satisfaction of the court. Even in the absence of specific record of preliminary questions or the satisfaction the appellate court could examine the nature and tenor of the evidence recorded, the manner in which the witness faced in cross-examination and satisfy itself about the competency under both the provisions.

A child witness may or may not be fully matured. By virtue of his tender years he is susceptible to tutoring by persons interested in the case or by near relations. A child witness is susceptible to influence from such persons. It is therefore necessary that court should examine the evidence of child witness with care or caution bearing in mind the susceptibility and possible immaturity of the child. In *Rameswar Kalyan Singh's case* AIR 1952 SC 54: (1952 Cri LJ 547) the court was considering the evidence of a child who was subjected to rape and the question whether the evidence of the rape on the child require corroboration. Vivian Bose J speaking for the court observed at p 550 (of Cri LJ):

> In my opinion, the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge..... The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, ... before a conviction without corroboration can be sustained. The tender years of the child, *coupled with other circumstances appearing in the case*, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

> The above observations were made in a case where the prosecutrix is the child and not in a case of a child who merely happened to witness commission of the crime. As we have indicated earlier, in such a case prudence requires that the court should be conscious of the susceptibility of the witness for tutoring and being subjected to extraneous influence. Having regard to the status of the witness, the nature of the evidence given by the witness, the manner in which he gave evidence and other circumstances obtaining in the case, it is open to the court to regard the evidence as either trustworthy in itself or as requiring corroboration.

[33] The notes of evidence recorded by the sessions court judge incorporated, as outlined above, a process by which he had formed his own satisfaction that the child witness SP7 in this case did not understand the oath or affirmation. Thereafter certain questions were posed to SP7 after which the following was recorded by the sessions court judge:

> Mahkamah:
>
> SP7 is possessed of sufficient intelligence and understands the duty of speaking the truth.

[34] Further to that the following is found in the grounds of judgment of the sessions court judge:

> The victim SP7 was nine years old when he testified in court. He is therefore a child of tender age and as such s 133A of the Evidence Act 1950 must be followed. I tested SP7 on his ability to understand the nature of the oath and found out that he could not understand it. I then tested him whether he is possessed of sufficient intelligence to justify the reception of the evidence and understand, the duty of speaking the truth through some questions that were posed to him by the learned DPP I found that SP7 was possessed of sufficient intelligence and understood the duty of speaking the truth. Hence, SP7 was allowed to testify and his evidence could be received in court.

[35] It is clear from a scrutiny of the above mentioned paragraphs that the sessions court judge had satisfied himself that the child witness of seven years did not comprehend the oath and thereafter embarked on a process of ascertaining the child's level of understanding. There does not appear to be merit in the contention of learned counsel for the respondent that in the process of ascertaining the competency of the child it is obligatory that the questions must have been posed by the sessions court judge himself as a prerequisite to the admissibility of the evidence. There was here not a total absence of the inquiry of ascertaining the level of understanding of the child but a suggestion that the child must be cross examined, in other words, that there should be conducted a voire dire. As indicated above the decision in *Sidek bin Ludan* did not contain that suggestion. We would disagree if it were

to be so suggested as it would not reflect the correct approach. Moreover the grounds of judgment and the notes of evidence of the sessions court judge disclosed that he had indeed directed his mind to the requirements of s 133A before embarking on the process of permitting the prosecution to lead evidence on the acts that were committed on SP7 by the respondent.

[36] On the question of corroboration the learned High Court judge made the following observation:

> Bagi saksi sebegini, keterangan beliau mesti disokong. Ini jelas seperti yang diperuntukkan oleh s 133A sendiri seperti di atas.

[37] In addition the learned High Court judge made a determination that the evidence of the three doctors were inconsistent and inconclusive. It is found that once again there has been occasioned another misdirection made by the learned judge.

[38] Three doctors have given evidence. It is noted that while SP8 was a medical officer who was giving evidence in court for the first time, SP2 is a pediatrician who at the time of the examination of the complainant is attached to the General Hospital Kuala Lumpur. In addition another pediatrician SP6 also gave evidence. The complainant has been SP6's patient and his evidence was that there was evidence of tears to the anus of the complainant that could not have been caused by constipation. The basis upon which the learned High Court judge disputed that there was corroboration of SP7's evidence was that the medical evidence could not be corroborative as they were inconsistent and therefore inconclusive. The tenor of his judgment hinted at disbelief and non-acceptance of the medical evidence.

[39] Section 133A of the Act 1950 was introduced in 1971. However even without such a provision it has already be stated in *Chao Chong & Ors v Public Prosecutor* [1960] MLJ 238, per Thomson CJ (as he then was):

> One reason why children's evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. In this country where evidence is taken on affirmation that consideration loses much of its force. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination. In our view something of the sort should have been put to the jury. At the very lowest they should have been invited to consider their own experience in connection with stories told by children. It was not sufficient merely to observe that there is a risk in acting on the uncorroborated evidence of a child.

In any event we have grave doubts as to whether even so far as it goes that observation is strong enough. As was said by Lord Goddard in the case of *Mohamed Sugal Esa v The King*:

> It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.

[40] The position stated does not differ from that expounded in *Kabiraj Tudu v State of Assam*.

[41] The views of the learned High Court judge simply ran contrary to the determination made by the sessions court judge. An appraisal of the records show that not only did the sessions court judge address his mind on the requirements of s 133A of the Act 1950 but he had proceeded to make his finding of facts on the issue of corroboration of SP7's evidence from the combined medical evidence of SP2 and SP6 which relate to the injuries to the SP7's anus. The question here is whether there were three inconsistent medical evidence or whether independently each of the evidence of the three medical doctors in its own way lend support to the fact of injuries caused to the anus in a way that was consistent with the version of the evidence given by SP7.

[42] Similarly the sessions court judge had also made a finding of facts on the case for the defence in which he had stated it to be one of bare denial. In its totality it is found that the infirmities alleged of the findings of the session court judge are indeed lacking in substance such as to warrant a justifiable intervention on the part of the learned High Court judge.

[43] It is found that the decision of the learned High Court judge in allowing the appeal against conviction had also stemmed from his determination that there was a fatal flaw in the approach taken by the sessions court judge in not making categorial assertion in the notes of evidence that a prima facie evidence had been established. Thereafter the learned High Court judge appeared to have embarked on his own evaluation of the evidence and to make a determination that s 133A of the Act 1950 has not been adhered to.

[44] This setting aside of the order for conviction invites a reference to the very question that was referred to the Federal Court in *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 which is equally applicable here. The question was:

A If a magistrate, without misdirecting himself, has made a finding of fact based on actual evidence before him, which finding of fact is corroborated in material particulars by inferences reasonably and properly drawn by him from other evidence adduced before him, such conviction not being against the weight of evidence in the case, is it open to a judge of the High Court on hearing an appeal against such conviction to upset or interfere with such finding of fact?

B

[45] The Federal Court in answering that question in the negative had held that an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and C hearing the witnesses and hence of assessing their credibility.

[46] A similar approach has been expressed in *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 39 and although this was in the context of an acquittal it was again in relation to the High Court subtituting its own D finding for that of the subordinate court. The relevant excerpts found in the judgment Hashim Yeop A Sani FJ (as he then was) are the following:

... what Lord Russell of Kilowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the E power conferred *the High Court should and will always give proper weight and consideration to such matters* as —

(1) the views of the trial judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

F (3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* where G he quoted from Lord Thankerton's judgment in *Thomas v Thomas* that:

> where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial H judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

The learned appellate judge held that the learned president had 'misdirected himself on the explanation of the accused'. Given the facts as stated in the appeal I record, can it be said that there was a misdirection? Or can it be said that the decision of the learned president was 'plainly unsound?' (*Thomas v Thomas*). On the facts of this case we do not think so.

[47] The aforementioned statements are equally applicable to this appeal. Before concluding it is pertinent to reiterate a matter that has been addressed by an unusual and emphatic coram of five judges in a panel of a Court of Appeal in the case of *Public Prosecutor v Ishak Hj Shaari & Other Appeals* [2003] 4 MLJ 585. This case becomes material to refer in the context of the oversight on the part of the learned High Court judge to consider applying s 422 of the Criminal Procedure Code in the face of the allegation that the trial judge had failed to make categorial annotations of a finding that a prima facie case had been adduced at the end of the case for the prosecution. Section 422 states, inter alia,:

> 422 Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) ...
>
> (c) unless such error, omission, irregularity, ... has occasioned a failure of justice.

[48] The reminder that is most useful in the context of the facts of this case which is also found to be directly applicable is thus (per Mohd Noor Ahmad JCA):

> The CPC is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the CPC is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the CPC and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the CPC is based. The modern trend should be to swing away from technicality and a greater endeavour should be made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused person, fair to the State and fair to the society for whose protection penal laws are made and administered (see *Willie (William) Slaney v State of Madhya Pradesh (S)*, supra). In order to interpret s 422 the whole provisions of the

CPC must be looked at in totality and the purposive approach should be adopted so as to promote the basic principle on which the CPC is based.

Section 422 of the CPC is couched in comprehensive form. Subsection (a) of the section only states 'any error, omission or irregularity...'. It does not mention 'illegality'. Be that as it may, as stated by case law, the distinction drawn in many of the cases in India between an illegality and an irregularity is on of 'degree' rather than of 'kind'. To our mind, the non-mention of 'illegality' in the subsection reflects the wisdom of Parliament in that, the court is given the discretion to decide whether in a particular case any error, omission or irregularity is curable but with the caveat that such error, omission or irregularity has not occasioned a failure of justice. And in the exercise of that discretion it is incumbent on the court to have regard to the promotion of the basic principle on which the CPC is based in the light of case law. Therefore, the errors in the judgments in the form of a misdirection on the standard of proof in these appeals should not be struck down automatically as illegalities, or as it were, by rule of thumb without first considering whether the accused has had a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice and thereafter, to decide whether the misdirection has occasioned a failure of justice otherwise the intention of Parliament in enacting s 422 is defeated. We prefer to approach the misdirection for the purpose of s 422 of the CPC in this manner. To begin with, to identify the error and then to identify the provision of the CPC that has been breached and thereafter, to apply the case law in order to determine whether the error can be cured under the section by reason that the misdirection has not occasioned a failure of justice and then if, only if the error has occasioned a failure of justice to declare the trial a nullity by reason that the misdirection tantamounts to an illegality.

[49] It is found that no misdirection has been done by the sessions court judge such as to render the trial conducted by him a nullity.

[50] In the circumstances hereinbefore explained the appeal is to be allowed. The judgment of the learned High Court judge is set aside and the conviction and sentence determined by the learned sessions court judge restored.

Appeal allowed.

Reported by K Nesan